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85-2142

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SOUTHWEST SUNSITES, INC.,
GREEN VALLEY ACRES, INC., a Texas Corporation,
GREEN VALLEY ACRES, INC., II, a Texas Corporation,
SYDNEY GROSS and EDWIN KRITZLER,
Petitioners,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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26 pp

BEST AVAIL

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

QUESTION PRESENTED

Whether the Court of Appeals for the Ninth Circuit erred in ruling that the administrative due process and statutory rights of respondents in a Federal Trade Commission adjudication were not infringed when the Commission decided the case under a previously undisclosed theory of deception that required the Commission to prove elements of its charge that were not at issue during the adjudication.

LIST OF PARTIES

The parties to the proceeding in the Court of Appeals for the Ninth Circuit were petitioners Southwest Sunsites, Inc., Green Valley Acres, Inc., Green Valley Acres, Inc., Sidney Gross and Edwin Kritzler, and respondent Federal Trade Commission.

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REPORTS OF OPINIONS

The decision of the court of appeals is reported at 785 F.2d 1431. The decision of the Federal Trade Commission is not yet officially reported. It is unofficially reported at 3 Trade Reg. Rep. (CCH) ¶ 22,226.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 1, 1986. The petition for writ of certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 554(b):

> Persons entitled to notice of an agency hearing shall be timely informed of—
>
> (1) the time, place, and nature of the hearings;
>
> (2) the legal authority and jurisdiction under which the hearing is to be held, and
>
> (3) the matters of fact and law asserted.
>
> When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

STATEMENT OF THE CASE

The five petitioners, Southwest Sunsites, Inc., Green Valley Acres, Inc., Green Valley Acres, Inc., II, Sydney Gross and Edwin Kritzler (hereinafter jointly referred to as "SWS"), were

respondents in a Federal Trade Commission (hereinafter "Commission" or "FTC") adjudication in which they were charged with three counts of unfair or deceptive acts or practices in violation of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The petitioners were engaged in the business of selling five- to forty-acre parcels of rural land in west Texas from 1973 until 1978. The petitioners ceased all promotional activities in 1978, and have transacted virtually no sales since then.

The FTC issued an administrative complaint on April 2, 1980. The complaint had three counts: (1) SWS deceptively represented the land to be a good investment with little or no financial risk, and failed to disclose the risk in purchasing the land; (2) SWS deceptively represented the land to be suitable for use as homesites, farms or ranches, and failed to disclose material information concerning the suitability of the land for such uses; and (3) SWS acted unfairly by deceptively inducing the payment of money and retaining the proceeds for land of little or no value as an investment, homesite, farm or for other reasonable use.

A lengthy hearing was held before an administrative law judge ("ALJ") of the Commission. The ALJ heard the testimony of sixty-seven witnesses and personally toured the properties at issue. He dismissed the entire complaint by an initial decision on July 29, 1982.

The staff appealed the dismissal to the Commission. After the case was briefed and argued in early 1983, the Commission in October 1983 issued a policy statement and in 1984 issued a decision in another case redefining the meaning of "deception." The Commission, relying on the new theory of deception, reversed the ALJ's decision in February 1985 and concluded that SWS had violated the FTC Act as alleged.

SWS appealed to the Court of Appeals for the Ninth Circuit. The court of appeals affirmed the decision on April 1, 1986. *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431 (9th Cir. 1986).

REASONS FOR GRANTING THE WRIT

A. The Federal Trade Commission Decided The Case On A Theory Significantly Different From The One On Which The Case Was Litigated

An administrative law judge of the FTC dismissed the complaint against SWS in an initial decision that was founded on the well-recognized standard of deception that had governed FTC actions for forty years: "Any advertising representation that has the tendency and capacity to mislead or deceive a prospective purchaser is an unfair and deceptive practice." App. 4a. The FTC staff appealed. Following briefing and argument of the appeal, the FTC announced a new standard of deception in a policy statement: "The Commission will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." FTC Enforcement Policy—Deceptive Acts and Practices (October 14, 1983), reprinted at 5 Trade Reg. Rep. (CCH) ¶ 50,455. The new standard became binding on the FTC when it was adopted in *Cliffdale Associates, Inc.*, 103 F.T.C. 110 (1984); *Amrep Corp. v. FTC*, 768 F.2d 1171, 1179 (10th Cir. 1985). The FTC decision in the present matter was served on February 4, 1985, sixteen months after the new theory was first announced. During the intervening time, there was no disclosure that the new theory would be enforced retroactively in this case, and no opportunity for SWS to respond to the new theory by offering argument or new evidence. Nonetheless, the FTC found deception based on the new theory.

B. The Decision Below Conflicts With Prior Decision Of Other Circuits And This Court

On appeal, the Court of Appeals for the Ninth Circuit recognized that due process and the Administrative Procedure Act require that the party proceeded against be informed of the matters at issue and have a "full opportunity" to address them. App. 4a. This conclusion is unassailable.[1] The court further

[1] Administrative Procedure Act, 5 U.S.C. § 554(b); *NLRB v. H. E. Fletcher Co.*, 298 F.2d 594, 600 (1st Cir. 1962).

recognized that where the FTC decides the case on a theory different from the one alleged, where different defenses and proofs would be used, the party is denied its rights unless it is given a fair opportunity to present its defense to the new theory. App. 4a. Finally, the court ruled that the new theory of deception *is* different from the old theory because the FTC's burden requires three elements of proof not necessary under the old theory of deception. Under the new theory, the three new elements that the FTC must prove are: (1) likelihood of deception instead of merely tendency and capacity; (2) likely deception of consumers acting reasonably, instead of merely any consumers; and (3) likelihood of reliance and injury instead of merely that the representation might have been considered important irrespective of reliance or injury. App. 5a.

Nonetheless, the court affirmed on the basis that SWS was not prejudiced by deciding the case on a new theory of deception. The justification for its affirmance was "[a]ll evidence relevant to the old theory was necessarily relevant to the new." App. 5a.

By adopting this novel "relevance" test, the Ninth Circuit's decision conflicts with the rule established by the Sixth Circuit in *Bendix Corp. v. FTC*, 450 F.2d 534 (6th Cir. 1971), and the D.C. Circuit in *Rodale Press, Inc. v. FTC*, 407 F.2d 1252 (D.C. Cir. 1968). Moreover, it is inconsistent with this Court's ruling in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972). In *Bendix* and *Rodale*, other circuits ruled that the Federal Trade Commission infringes a respondent's rights when, by changing theories midstream, it deprives the respondent of a fair opportunity to address the theory on which the case is decided. In *FTC v. S&H*, this Court held that the Commission cannot substitute theories even though evidence relevant to the new theory may already be in the record.

The Sixth Circuit correctly recognized that the law requires that "if there would have been any difference in defending the action based on the [old] theory as compared to the [new] theory, Bendix was entitled to an opportunity to defend against

the theory upon which the Commission acted." *Bendix*, 450 F.2d at 541. In other words, if there is any difference between the two theories such that Bendix would have offered evidence or argument relevant to the new theory that was not relevant to the old theory, Bendix's rights are infringed if it is denied the opportunity to offer that evidence or argument. *Id.* at 549-42.

It was the absence of opportunity to address the new theory that was found to violate the respondent's rights in *Bendix*. The court pointed out that the Commission "decided the case on a theory of illegality which was never charged, raised, nor tried during the administrative hearing; never presented for consideration by the Hearing Examiner; and not raised as an issue or discussed by Complaint Counsel in the appeal. . . ." *Id.* at 537. It noted also that Bendix "was accorded no opportunity to present evidence in defense of this [new] theory." *Id.* This is precisely the same situation as occurred in the present case. However, the *Bendix* court saw that the key was the absence of opportunity to address the new issue, not merely whether the evidence in the record would have been relevant to the new issue.

In *Rodale Press*, the D.C. Circuit also recognized that the determinative issue is whether the party had "the *opportunity* to present argument under the new theory of violation." 407 F.2d at 1257 (emphasis in original). This test focuses on the question misapprehended in the present case. If there was an argument or evidence the defending party could have presented under the new theory that would not have been relevant under the old, then its rights were infringed if it was denied the opportunity to present that argument or evidence. The *Rodale* court explicitly rejected the position of the Ninth Circuit. It ruled that:

> The evil at which [section 5 of the APA] strikes is not remedied by observing that the outcome would perhaps or even likely have been the same. It is the *opportunity* to present argument under the new theory of violation, which must be supplied.

Id. at 1259 (emphasis in original).

The court of appeals here considered whether evidence relevant under the old theory would have also been relevant under the new. Because the new theory sets a higher standard for the Commission to meet, the answer clearly is yes. But the court did not look at the critical issue. When it raised the standard of proof, the Commission obligated itself to prove matters that were not necessary to prove under the old theory. In light of the fact that proof of these matters was not necessary at the time the case was adjudicated, the critical issue is whether SWS had a fair opportunity to offer evidence or argument directed at these new issues. If not, SWS's rights were infringed. This conclusion would have been clear under the law in the Sixth and District of Columbia Circuits, but was obscured by the erroneous test formulated by the Ninth Circuit.

This Court considered the same question in a closely analogous situation in *FTC v. S&H*, 405 U.S. 233 (1972). The Commission found that S&H violated the FTC Act through actions that were contrary to the antitrust laws. The Court of Appeals for the Fifth Circuit reversed the Commission's order on the grounds that the contested conduct did not violate the letter or spirit of the antitrust laws, and the Commission had no power to find an act an unfair method of competition unless it violated the letter or spirit of the antitrust laws. This Court ruled that the Commission does have authority beyond the antitrust laws.

In light of this expansive reading of the FTC Act, the Commission argued in *FTC v. S&H* that its order should be affirmed on the grounds that the conduct, although not violating the antitrust laws, was nonetheless unfair. This Court rejected the Commission's ploy. It would not allow the Commission to substitute theories while the case was on appeal. While the circumstances of the *S&H* case were admittedly different from the present, one aspect of the decision is precisely on point. The Court noted that the Commission's findings, and presumably the evidence supporting those findings, would have been a sufficient basis for the Commission's order under the new theory. *Id.* at 248. Or, in the jargon of the Ninth Circuit, the evidence offered with respect to the old theory was also relevant to the new theory that the Commission sought to

substitute. However, because the Commission's decision had not been based on the new theory, the Court remanded the matter. *Id.* at 250.

On remand, the Commission ordered the parties to brief the new theory. *In the Matter of Sperry & Hutchinson Co.*, 82 F.T.C. 390 (1973). Under the formulation enunciated herein by the Ninth Circuit, the briefing would not have been necessary because the evidence already in the record was relevant to the new theory. Nonetheless it was recognized then, and should be now, that administrative due process and the Administrative Procedure Act demand that the respondent have the opportunity to address the new theory.

C. SWS Had Been Prejudiced By Reliance Upon A New Theory Of Deception

A remand in this instance would not be an empty formality. There are critical issues that were never addressed by either party when the case was litigated. Argument on these issues could very well have altered the outcome of the case. A few examples will illustrate that the outcome could have been different had SWS been accorded an opportunity to address the new theory, though as *Bendix* and *Rodale Press* make clear, the loss of opportunity is what deprives a party of its rights irrespective of the effect on the outcome.

In announcing the new theory of deception, the FTC emphasized that it would be relevant to survey consumers to determine the likelihood of deception. 5 Trade Reg. Rep. (CCH) at 56,073 n. 8. Under the theory of deception at the time of the adjudication such evidence would have been irrelevant. In *Ford Motor Co.*, 87 F.T.C. 756 (1976), the respondent offered survey evidence to demonstrate consumer understanding of the representation. The FTC did not even consider the evidence, because it was irrelevant under the standard of deception then in effect. *Id.* at 794-95. In light of the *Ford* decision, there was no meaningful opportunity for SWS to offer survey evidence when the case was litigated under the old theory, and no such evidence was offered. Such evidence would have been relevant, and perhaps decisive,

under the new theory of deception. See also Millstein, *The Federal Trade Commission and False Advertising*, 64 Colum. L. Rev. 439, 478 (1964). SWS was therefore denied the opportunity to offer evidence that would have been important under the theory of deception that guided the Commission's decision, and SWS was denied also the opportunity to argue that complaint counsel failed to meet their burden of proof by failing to offer extrinsic evidence of consumer beliefs.

Nor was the issue of reliance litigated before the ALJ. Under pre-existing law, it would have been unavailing for SWS to have offered evidence that consumer decisions were not actually affected by the alleged representations. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965). But under the new standard of deception, evidence that the representations did not alter consumer behavior could have been decisive. *Cliffdale Associates*, 103 F.T.C. at 196.

The change in theories also denied SWS the opportunity to address the effect of the change on the *staff's* case. The staff has the burden of proof. Rules of Practice of FTC, 16 C.F.R. § 3.43(a). The new theory requires the staff to prove the *likely* understanding of *reasonable* consumers to their *detriment*. The staff offered no evidence on these new issues, and SWS had no opportunity to address these critical omissions.

The change in theory also denied SWS the right to have the issues of likelihood, reasonableness and injury decided in the first instance by the ALJ who observed the witnesses. By changing theories after the ALJ had relinquished jurisdiction, the FTC circumvented all issues of credibility, a particularly unfair procedure in a case where the ALJ found the staff's witnesses less credible than SWS's witnesses.

There are thus substantial arguments that could have been made and evidence that could have been crucial under the new theory that would not have been relevant under the old theory. It was the absence of opportunity for SWS to present such argument and evidence that poisoned the FTC proceeding. The Ninth Circuit, however, in focusing on whether the evidence relevant to the old standard would also be relevant under

the new, failed to consider whether SWS had a fair opportunity to present evidence and argument under the new theory that might not have been offered under the old.

There is, therefore, a split among the circuits on how to determine whether a respondent has been denied statutory and due process rights in an administrative adjudication where the agency decides the case on the basis of a theory different from the one alleged in the complaint and litigated by the parties. Two circuits have ruled that rights are denied if the respondent was denied the opportunity to present evidence or argument relating to the new theory. This test is consistent with the outcome of *FTC v. S&H* in this Court. Under this test, it would have been found that SWS's rights were infringed. The Ninth Circuit ruled herein that rights are denied only if evidence relevant to the old theory would not necessarily be relevant to the new. Under that erroneous formulation of the law, the court incorrectly found that SWS's rights were not infringed, notwithstanding the lack of opportunity to address the new theory of deception. This split among the circuits merits consideration by this Court.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

United States Court of Appeals

FOR THE NINTH CIRCUIT

C.A. No. 85-7182

FTC No. 9134

SOUTHWEST SUNSITES, INC., GREEN VALLEY ACRES, INC., a Texas Corporation, GREEN VALLEY ACRES, INC., II, a Texas Corporation, SYDNEY GROSS and EDWIN KRITZLER,
Petitioners,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

OPINION

Petition to Review an Order of the Federal Trade Commission

Argued and Submitted December 9, 1985
San Francisco, California

Before: WRIGHT, KENNEDY and BEEZER, Circuit Judges.

BEEZER, Circuit Judge:

Petitioners Southwest Sunsites, Inc. ("SWS"), Green Valley Acres, Inc. ("GVA"), Green Valley Acres, Inc. II ("GVA II"), Sidney Gross, and Edwin Kritzler, appeal the Federal Trade Commission's finding that their representations and failures to disclose, in connection with the sale of rural, undeveloped land, violated the Federal Trade Commission Act,

15 U.S.C. § 45(a) (1982). Petitioners contend that application of a new deception standard violates their due process rights and the Administrative Procedures Act, that ex parte communications require reversal, that there is no substantial evidence to support the findings, and that the order is overly broad. We affirm.

FACTS

Petitioners SWS, GVA, and GVA II are land sales companies incorporated in Texas with corporate headquarters in California. Petitioners are engaged in the sale of undeveloped rural land in west Texas for use as farms, ranches, homesites, and commercial uses. Sales are primarily to out-of-state purchasers. Petitioner Kritzler is the general manager of each corporation, responsible for day-to-day corporate operations and general policy decisions. Petitioner Gross and members of his family own all the stock in each corporation. Gross was the exclusive sales agent for SWS, GVA and GVA II.

Between 1973 and 1977, petitioners acquired 40,000 acres of undeveloped land in west Texas. Petitioners used both their own employees and independent brokers to sell the land. Petitioners purchased a 17,647 acre tract (Southwest Sunsites) in 1973 at about $27 per acre and sold 5, 10, and 40 acre parcels from that tract for $600.00 to $700.00 per acre. Of the 1800 parcels in the tract, between 1300 and 1595 were sold to the public. Green Valley Acres, consisting of 1200 five-acre parcels, was acquired for about $50.00 per acre in 1976 and sold for $800.00 to $1,200.00 per acre.

The land was marketed through newspaper, television and radio advertisements. Radio and television ads appeared as often as 150 times a week. Petitioners maintained sales offices in Dallas, Houston, Atlanta and, for a brief time, Boston. Staff in the Houston and Dallas offices organized promotional dinners.

Brochures produced by petitioners touted the land as a good safe investment. Buyers were told that the land was a good investment because industrial development was likely.

Oil, rubber, nuclear and uranium interests were all potential developments. Petitioners also represented the land as suitable for homesites, subsistence farms, and non-commercial ranches.

Ultimately 80 percent of the land was sold by Porter Realty, an independent brokerage that worked for petitioners from 1974 until 1978. Porter Realty conducted a nationwide telephone campaign, using scripts approved by petitioners and mailed information packets supplied by petitioners to prospective purchasers.

An "Agents Agreement" with Porter Realty authorized it to solicit sales but forbade both acceptance of sales offers and representations inconsistent with materials supplied by petitioners. Porter Realty distributed an oil map [1] which depicted ownership of parcels near GVA and GVA II by oil interests. Petitioners hired Jeffrey Elfont to contact customers who purchased from Porter Realty and to retract all oil development representations made by Porter Realty. Kritzler testified that he cancelled the contracts and refunded the money of persons who purchased the land as an investment in reliance upon Porter Realty's oil development representations. Some but not all such buyers were contacted.

The FTC lodged a three count complaint contending that petitioners engaged in unfair and deceptive practices in violation of § 5 of the Federal Trade Commission Act. The complaint alleged that petitioners (1) misrepresented that the parcels were a good investment involving little or no financial risk and deceptively failed to disclose material information regarding their financial risk, (2) misrepresented that the land was suitable for residential use, farming, and ranching, and deceptively failed to disclose material information regarding the suitability of the properties for these purposes, and (3) sold land that was of little or no value for the represented purposes and unfairly retained proceeds from the sales. An administrative law judge (ALJ) dismissed the complaint, the Commission reversed and issued a cease and desist order, from which petitioners timely appeal.

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[1] The Commission found that petitioners acquiesced in Porter's distribution of the map to prospective purchasers.

ANALYSIS

Standard of Review

The Commission's factual findings are conclusive if supported by evidence sufficient to permit a reasonable mind to accept the Commission's conclusion. *Litton Industries, Inc. v. FTC*, 676 F.2d 364, 368 (9th Cir. 1982).

I. The Deception Standard

The ALJ dismissed the complaint under the deception standard that "any advertising representation that has the *tendency and capacity* to mislead or deceive a prospective purchaser is an unfair and deceptive practice." The Commission applied a "new" standard: "[T]he Commission will find deception if there is a representation, omission or practice that is *likely* to mislead the consumer acting *reasonably* in the circumstances, to the consumer's detriment." [2]

Petitioners contend that application of the new deception standard violated the Administrative Procedures Act (APA), 5 U.S.C. § 554 (b) which requires that they be "timely informed of the matters of fact and law asserted." 5 U.S.C. § 554(b)(3). Petitioners also contend that their due process rights were violated because the Commission "based its decision on a new theory of deception that was significantly different from the one litigated by the parties."

The purpose of the notice requirement in the Administrative Procedures Act is satisfied, and there is no due process violation, if the party proceeded against "understood the issue" and "was afforded full opportunity" to justify his conduct. *Golden Grain Macaroni Co. v. FTC*, 472 F.2d 882, 885 (9th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973).[3]

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[2] The new standard became binding on the FTC when it was adopted in *Cliffdale Associates, Inc.*, 3 CCH Trade Reg. Rep. ¶ 22,137 (1984); *Amrep Corp. v. FTC*, 768 F.2d 1171, 1179 (10th Cir. 1985).

[3] In *Golden Grain Macaroni Company v. FTC*, we held that neither the APA nor due process was violated when the complaint charged defendants with violation of § 2 of the Sherman Act (monopolization and attempt to monopolize), but they were found to have violated § 7 of the Clayton Act (making an acquisition where the effect may substantially lessen competition

(footnote continues)

Each of the three elements of the new standard challenged by petitioner imposes a greater burden of proof on the FTC to show a violation of Section 5. First, the FTC must show probable, not possible, deception ("*likely* to mislead," not "*tendency and capacity* to mislead"). Second, the FTC must show potential deception of "consumers acting reasonably in the circumstances," not just any consumers. Third, the new standard considers as material only deceptions that are likely to cause injury to a reasonable relying consumer, whereas the old standard reached deceptions that a consumer might have considered important, whether or not there was reliance.

The Commission reversed the ALJ's findings on a theory more narrow than, but completely subsumed in, the prior theory. All evidence relevant to the old theory was necessarily relevant to the new. We cannot accept petitioners' argument that a "substantially different standard was applied, to which [they] had no opportunity to respond." This is not a case in which it was "readily apparent that different defenses and proofs would be used in defending against . . . two theories" of liability." *Bendix Corp. v. FTC*, 450 F.2d 534, 541 (6th Cir. 1971). The Commission did not violate the APA or the petitioners' due process rights.

II. Ex Parte Communications

Petitioners contend that the complaint should be dismissed because complaint counsel gave the Commission four written memoranda during adjudication of petitioners' case and was dilatory in placing copies in the public record.[4] The memo-

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(footnote continued)

or may tend to create monopoly). We found that petitioner had understood the issue and was afforded an opportunity to defend where, despite obvious differences between Sherman Act and Clayton Act standards, the same facts were pertinent to both theories.

But when each theory is based upon different assertions of fact, the Commission violates the APA if it finds respondent liable under a theory not raised before the ALJ. *Bendix Corporation v. FTC*, 450 F.2d 534, 541 (6th Cir. 1971).

[4] The ex parte communications consist of a staff memorandum ("Buenger/Perkins II), a transmittal memorandum from the Deputy Director of the

(footnote continues)

randa concerned consent agreement negotiations between the agency and petitioners' co-respondents, Porter Realty and Irvin Porter. Agency regulations explicitly permit internal communication concerning consent settlements. 16 C.F.R. § 4.7(f) (1985). To the extent that such communication relates to a fact in issue in an ongoing adjudication, "such portion will be placed in the docket binder of the proceeding to which it pertains." *Id.* The regulations do not specify the time within which that must be done, but require that all adjudicative proceedings of the FTC be conducted "expeditiously." 16 C.F.R. § 3.1 (1985). The proposed consent agreement and recommendations were forwarded to the Secretary on April 19, 1983, but were not placed on the record until August of 1984.

Ex parte communications do not void an agency decision. *PATCO v. FLRA*, 685 F.2d 547 (D.C. Cir. 1982). The agency decision is voidable and the court will consider whether "the agency's decisionmaking process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either to an innocent party or to the public interest that the agency is obliged to protect." *Id.* at 564. Relevant considerations are the gravity of the ex parte communication, whether the communication may have influenced the decision, whether the party making the communication benefited from the decision, whether opposing parties knew of the communication and had an opportunity to rebut, and whether vacation and remand of the decision would serve a useful purpose. *Id.* The court is concerned primarily with the integrity of the process and the fairness of the result rather than adherence to mechanistic rules. *Id.*

Petitioners allegation must overcome a presumption of honesty and integrity on the part of the Commission, and thus a presumption that the decision rests on proper grounds. *Porter*

(footnote continued)

Bureau of Consumer Protection, and a one sentence transmittal memorandum from the Deputy Director.

Petitioners also count Buenger/Perkins I, a document reviewed by the Bureau of Consumer Protection but never transmitted to the Commission. Buenger/Perkins I also concerns the settlement agreement and, like the other memoranda, was a "protected" communication under agency rules.

County Chapter v. Nuclear Regulatory Commission, 606 F.2d 1363, 1371 (D.C. Cir. 1979). The communications here were expressly permitted by agency regulations and disclosure was made to petitioners as required by the regulations. 16 C.F.R. § 4.7 (1985). Although the disclosure was not prompt, petitioners had an opportunity to respond to the documents. The ex parte communications here did not invalidate the Commission's proceedings.

III. Substantial Evidence

When the agency and ALJ agree, the appellate court will not reverse the ALJ's credibility findings unless they are "inherently incredible or patently unreasonable." *NLRB v. Anthony Co.*, 557 F.2d 692, 695 (9th Cir. 1977); *United Association of Journeymen, Local Union No. 575 v. NLRB*, 553 F.2d 1202, 1205 (9th Cir. 1977).

When the agency and the ALJ disagree, findings of an ALJ are merely part of the record before the agency. *NLRB v. Brooks Camera, Inc.*, 691 F.2d 912, 915 (9th Cir. 1982). The court's deference is to the agency determination, not that of the ALJ. *Stamper v. Secretary of Agriculture*, 722 F.2d 1483, 1486 (9th Cir. 1984); *Loomis Courier Service Inc. v. NLRB*, 595 F.2d 491, 495 (9th Cir. 1979).

Petitioners argue that the following Commission findings are based upon insufficient evidence and/or unwarranted reversals of the judge's credibility findings:

1. that petitioners' employees made oral representations concerning the land's investment potential;

2. that the land is not suitable for residential use, small-scale farming, or ranching;

3. that the land has little value for any of the represented uses;

4. that petitioners' brokers had actual and apparent authority to make representations concerning oil-related development,

5. that Gross and Kritzler personally participated in and approved of the unlawful practices.

Oral Representations by In-House Staff (Count I)

In analyzing Count I, the ALJ considered whether petitioners had represented the land as a "risk-free" investment and found by a preponderance of the evidence that they had not. The Commission reversed, holding that Count I did not require proof of a representation that profits were guaranteed. The Commission concluded that the ALJ had failed to consider the "net impression communicated to consumers" through petitioners' written and oral representations.

The Commission identified three types of misleading representations about the land as a good or low risk investment:

> "(1) general assurances that land, and therefore this land in particular, is a good investment and a good way to make money;
>
> (2) specific assurances that profits on this land could be realized in a short time frame, that purchasers could expect to double or triple their money, and that no loss would be suffered; and
>
> (3) descriptions of oil and gas activity and other potential developments in the area, as well as recitals of residential, farming, and ranching uses for the land, that conveyed the representation that the land was a good investment".

The Commission based these findings on promotional materials composed by petitioners and upon the testimony of witnesses. The Commission's findings were not based upon redeterminations of the ALJ's credibility findings and are supported by substantial evidence.

Suitability of the Land for Use as a Homesite, Farm, or Ranch (Count II)

The Commission, ALJ, and the parties agree that petitioners represented the land as suitable for use as a homesite, farm, or ranch.

The ALJ found those representations not deceptive because there were "no insurmountable obstacles" to residential

use, "sufficient information" was provided about utility costs, and the evidence showed the feasibility of limited farm/ranch use.

In contrast, the Commission considered petitioners' failure to disclose substantial development costs in light of their earlier representations of suitability. The Commission found the representations deceptive because they inaccurately portrayed the practical and economic suitability of the land for these uses. The Commission concluded that petitioners "failure to disclose material information needed to correct misimpressions [about development costs] amount[ed] to a misleading practice."

The Commission based these findings on petitioners' acknowledgment, sales materials, and testimony of salesmen and consumers. The Commission also considered evidence about the cost of utilities, the availability of financing, the local market for produce, and the land required for cattle grazing.

The Commission's findings that the representations inaccurately portrayed the land's suitability and failed to disclose development costs, are supported by substantial evidence.

Value of the Land (Count III)

The Commission reversed the ALJ's findings on value because the ALJ failed to make findings as to the land's actual market value. The ALJ declined to resolve conflicting testimony as to the value in concluding that the land was not "of little or no value." The Commission found that the land's high cost relative to market value, the "steep development costs," and the risks and limitations attendant to the proposed uses supported its conclusion that the land had little or no value as an investment.

The Commission based its findings in part on the testimony of complaint counsel's expert, Mr. Compere. Although the Commission conceded that the methodologies of both Compere and petitioners' expert were flawed, it accepted Compere's testimony because his valuations properly considered resale values and satisfactorily resolved discrepancies as to prices paid for similarly-sized parcels.

Compere's qualifications as an expert were not challenged by petitioners. Compere's testimony constitutes substantial evidence which supports the Commission's finding as to the land's investment value.

The Commission correctly held that property sold here for a price many times greater than its market value did not meet any sensible definition of investment value.

Apparent and Actual Authority of Petitioners' Broker

The Commission found that Porter Realty had both actual and apparent authority to make representations on investment val[illegible] A principal is bound by the acts of his salesperson if those acts are within the scope of his apparent or actual authority, unless the third party has actual notice that the acts are unauthorized. *Goodman v. F.T.C.*, 244 F.2d 584, 592 (9th Cir. 1957).

The ALJ found no apparent authority because "[t]here must come a point where a respondent is permitted to exculpate himself .... [T]he actions taken by respondents to correct the situation ... were sufficient to place respondents beyond the reach of those cases [making them liable for actions of agent]." The Commission reversed, finding that furnishing sales materials for public distribution to Porter Realty, which identified petitioners as sellers, clothed Porter Realty with apparent authority to make investment and other representations.

The Commission considered the telephone scripts and written sales material furnished by petitioners to Porter Realty and the testimony of customers. The Commission noted the close business relationship between petitioners and Porter Realty, which included almost daily telephone conferences. On the basis of this continual communication the Commission rejected the argument that petitioners didn't know of the oil map use.

The Commission found that petitioners' remedial actions, contacting persons who purchased from Porter Realty, instituting a refund policy, and providing "disclaimers" in the fact sheets and sales agreements, were not sufficient to limit Porter Realty's apparent authority.

The Commission found also that Porter Realty had *actual* authority through the Agents Agreement to make investment-related representations not in conflict with written material produced by petitioners. Porter Realty was free to make representations on subjects not mentioned in the written material. The Commission found that Porter Realty made misrepresentations about the land that were not in conflict with the Agents Agreement, especially the investment value and the extent and significance of nearby oil and gas activity.

We conclude that substantial evidence supports the Commission's findings that petitioner violated Section 5 through the misrepresentations committed by agents whom they vested with actual and apparent authority. This finding was not based on a reversal of the ALJ's credibility determinations.

Individual Liability

The FTC order bound Gross and Kritzler in their individual capacities. Gross and Kritzler argue that the Commission did not have substantial evidence on which to base its finding that they participated in and approved of the unlawful practices and that the Commission substituted its credibility findings for those of the administrative law judge. Gross and Kritzler selected the properties to be purchased and the prices to be charged, decided upon the deceptive content, promotional materials, commercials, and sales contracts. They prepared or approved television and radio advertisements containing deceptive representations.

The ALJ did not explicitly address individual responsibility. Because he found no violation of the FTC Act, he did not apportion responsibility. Therefore, he made no credibility findings to which the agency or this court should defer. Substantial evidence supports the Commission's finding of individual responsibility based on their managerial and policy-making responsibilities.

IV. The Order

Petitioners argue that the Commission's order, which required disclosure to past as well as future buyers, exceeds the agency's authority.

The Commission has broad remedial power and a remedial order should be upheld if reasonably related to the unlawful practices found to exist. *Chrysler Corp. v. FTC*, 561 F.2d 357, 364 (D.C. Cir. 1977).

Orders requiring affirmative disclosures and corrective advertising are clearly within the agency's power. *Amrep Corp. v. FTC*, 768 F.2d 1171, 1180 (9th Cir. 1985). These corrective orders do not constitute retroactive private relief. *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974). Nor is this an instance of enjoining past violations which are unlikely to recur. *FTC v. Evans Products Co.*, 775 F.2d 1084 (9th Cir. 1985).

CONCLUSION

The Commission is AFFIRMED.